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DEC 04 2007

In re Application of :
John Lezdey and Jarrett Lezdey :
Application No. 10/001,311 :
Filed: November 23, 2001 :
Attorney Docket No. 1434-C :
For: Antimicrobial Compositions :

OFFICE OF PETITIONS

Decision on Petition

Corrected Decision:

This is a corrected decision on the petition under 37 CFR 1.137(a), filed October 23, 2007, to revive the above-identified application. The petition is filed in the alternative under 37 CFR 1.137(b).

The petition under 37 CFR 1.137(a) is **dismissed**.

The petition under 37 CFR 1.137(b) is **granted**.

Facts:

The above-identified application became abandoned for failure to reply in a timely manner to the final Office action mailed June 23, 2004, which set a shortened statutory period for reply of three (3) months.

"The Official Action dated June 23, 2004 was received and a response was prepared to be filed before September 23, 2004."¹

On August 7, 2004, while in Cape Cod, Attorney John Lezdey, suffered an accident. The accident resulted in spinal fracture and limited leg movement.

Attorney Lezdey states, "In the hospitals, Petitioner was bed ridden and had no files because he expected to return to the Florida office by September 1, 2004."²

Attorney Lezdey was hospitalized until September 10, 2004.

¹ March 14, 2005 petition.

² July 2, 2007 petition.

Since no extensions of time under the provisions of 37 CFR 1.136(a) were obtained, the application became abandoned as of midnight on September 23, 2004.

Lezdey signed the Certificate of Express Mailing and Transmittal sheets for the following applications:

- (1) Application No. 10/951,051 filed by Express Mail on September 24, 2004,
- (2) Application No. 10/951,190 filed by Express Mail on September 24, 2004, and
- (3) Application No. 29/214,128 filed by Express Mail on September 27, 2004.

Attorney Lezdey underwent physical therapy until October 2004.

Attorney Lezdey returned to Florida on November 24, 2004. Attorney Lezdey states he did not return to the Office until December 3, 2004.

Lezdey signed the Certificate of Express Mailing and Transmittal sheets for the following applications:

- (1) Application No. 10/999,037 filed by Express Mail on November 29, 2004,
- (2) Application No. 11/006,279 filed by Express Mail on December 8, 2004,
- (3) Application No. 11/010,028 filed by Express Mail on December 10, 2004,
- (4) Application No. 11/010,219 filed by Express Mail on December 9, 2004,
- (5) Application No. 11/018,620 filed by Express Mail on December 10, 2004, and
- (6) Application No. 11/021,589 filed by Express Mail on December 22, 2004.

A reply to the June 23, 2004 Office action, mailed for the instant application, could have been timely filed as late as December 23, 2004, with payment for a three-month extension of time. In other words, petitioner could have prevented the abandonment of the instant application by filing a reply and payment for a three-month extension of time on or before December 23, 2004.

The current petition states, "In January, 2005 Petitioner filed a Petition to Make Special and to request that the Petition also be considered as Unintentional. This petition was filed after Petitioner returned to Florida." Office records fail to indicate any papers were filed in the instant application during January of 2005.

Lezdey signed the Certificate of Express Mailing and Transmittal sheets for the following applications:

- (1) Application No. 11/030,626 filed by Express Mail on January 6, 2005,
- (2) Application No. 11/030,826 filed by Express Mail on January 7, 2005, and
- (3) Application No. 11/041,128 filed by Express Mail on January 21, 2005.

A Notice of Abandonment was mailed for the instant application on February 14, 2005.

Attorney Lezdey has stated, "It was not know[n] that the application was abandoned until the Notice of Abandonment was received."³

³ March 14, 2005 petition.

A petition under 37 CFR 1.137(a) was filed March 14, 2005 (Certificate of Mailing date of March 10, 2005).

A decision dismissing the March 14, 2005 petition was mailed June 29, 2005. The decision stated,

Any request for reconsideration should fully discuss *all* papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. In addition, any such request should fully discuss the extent to which petitioner handled other work-related matters during the relevant time period. For example, was petitioner able to attend any court hearings or file papers with any courts during the time from August 7, 2004, and March 14, 2005?

The June 29, 2005 decision stated, "Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted."

A request to change the address of record was filed September 8, 2005.

A renewed petition was not filed until December 26, 2006. The renewed petition stated a continuation-in-part application had been filed and petitioner wished to revive the application solely for copendency.

The December 26, 2006 renewed petition failed to discuss papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. The renewed petition failed to discuss the extent to which petitioner handled other work-related matters during the relevant time period. A petition to make special was filed January 13, 2006. The Office notes the petition to make special is currently moot since petitioner seeks to revive the instant application solely for copendency with the continuation-in-part application.

A decision dismissing the December 26, 2006 was mailed May 1, 2007. The decision repeated the following statement made in the prior decision:

Any request for reconsideration should fully discuss *all* papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. In addition, any such request should fully discuss the extent to which petitioner handled other work-related matters during the relevant time period. For example, was petitioner able to attend any court hearings or file papers with any courts during the time from August 7, 2004, and March 14, 2005?

The December 26, 2006 renewed petition was filed almost 18 months after the mailing date of the June 29, 2005 decision. The renewed petition was filed beyond the maximum extendable period of time set in the June 29, 2005 decision. The renewed petition failed to provide any explanation for the almost 18 months of delay. The May 1, 2007 decision stated,

The instant petition is untimely. The June 26, 2005 decision stated, "Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted." The instant petition was not filed until 18 months after the mailing of the June 26, 2005 decision. Therefore, the petition is dismissed as untimely.

Petitioner filed a request for reconsideration on July 2, 2007. The petition was dismissed in a decision mailed on September 7, 2007.

Discussion:

The petition under 37 CFR 1.137(a):

A grantable petition under 37 CFR 1.137(a) must be accompanied by a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable.

"[T]he question of whether an applicant's delay in prosecuting an application was unavoidable must be decided on a case-by-case basis, taking all of the facts and circumstances into account."⁴ The general question asked by the Office is: "Did petitioner act as a reasonable and prudent person in relation to his most important business?"⁵

Petitioner has failed to prove the entire delay in filing a grantable petition was unavoidable.

Petitioner appears to contend Lezdey had prepared the following applications prior to his accident and only needed to review and check the applications:

- (1) Application No. 10/951,051 filed by Express Mail on September 24, 2004,
- (2) Application No. 10/951,190 filed by Express Mail on September 24, 2004,
- (3) Application No. 29/214,128 filed by Express Mail on September 27, 2004,
- (4) Application No. 10/999,037 filed by Express Mail on November 29, 2004,
- (5) Application No. 11/006,279 filed by Express Mail on December 8, 2004,
- (6) Application No. 11/010,028 filed by Express Mail on December 10, 2004,
- (7) Application No. 11/010,219 filed by Express Mail on December 9, 2004,
- (8) Application No. 11/018,620 filed by Express Mail on December 10, 2004,
- (9) Application No. 11/021,589 filed by Express Mail on December 22, 2004.
- (10) Application No. 11/030,626 filed by Express Mail on January 6, 2005,
- (11) Application No. 11/030,826 filed by Express Mail on January 7, 2005, and
- (12) Application No. 11/041,128 filed by Express Mail on January 21, 2005.

⁴ Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (1982).

⁵ See In re Mattullath, 38 App. D.C. 497 (D.C. Cir. 1912).

Petitioner has stated, "The Official Action dated June 23, 2004 was received and a response was prepared to be filed before September 23, 2004."⁶ Petitioner has failed to prove Attorney Lezdey's was able to sign, review, check, and mail several applications, but was unable to sign and mail the prepared reply to the June 23, 2004 Office action. The Office notes a reply to the Office action, could have been timely filed as late as December 23, 2005 with payment for a three-month extension of time.

Attorney Lezdey has stated, "It was not know[n] that the application was abandoned until the Notice of Abandonment was received."⁷ Attorney Lezdey has failed to distinguish and discuss the period of delay arising from his failure to know he needed to file a reply rather than his health condition. Petitioner must prove the entire delay in the submission of a grantable petition was unavoidable. The Office notes a petition under 37 CFR 1.137(a) was not filed until March 14, 2005 (Certificate of Mailing date of March 10, 2005).

Petitioner has still not discussed all papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. The instant petition fails to discuss the extent to which petitioner handled other work-related matters during the relevant time period.

The Office notes Lezdey filed papers in at least one application during the relevant time period. A final Office action was mailed in Application No. July 8, 2004. An amendment was mailed to the Office on October 5, 2004. An Advisory Action was mailed November 12, 2004. A new reply was filed November 19, 2004. A second Advisory Action was mailed December 29, 2004.

Any request for reconsideration under 37 CFR 1.137(a) must fully discuss all papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. Any request for reconsideration should fully discuss the extent to which petitioner handled other work-related matters during the relevant time period.

The prior decision stated,

The June 29, 2005 decision stated, "Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted."

A renewed petition was not filed until December 26, 2006. The renewed petition fails to establish the December 26, 2006 petition was timely or prove the delay in filing the December 26, 2006 petition was unavoidable.

Petitioner has failed to provide any evidence to demonstrate the delay in the filing of the December 26, 2006 petition was unavoidable.

For the reasons previously discussed, the petition under 37 CFR 1.137(a) cannot be granted.

⁶ March 14, 2005 petition.

⁷ March 14, 2005 petition.

The petition under 37 CFR 1.137(b):

The required fee for a petition under 37 CFR 1.137(b) is \$770. Petitioner submitted \$520. Therefore, per the fee authorization filed with the petition, the sum of \$250 has been charged to petitioner's deposit account.

The prior December 26, 2006 petition indicates petitioner only seeks to revive the application so as to have copendency with a Continuation-In-Part application.

Since this application is being revived for purposes of continuity only and since continuity has been established by this decision reviving the application, the application is again abandoned in favor of Application Number 11/711,272.

Telephone inquiries regarding this communication should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



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Office of Petitions